Jamaludin bin Md Kassim v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–98 OF 2007
ZAINUN ALI, AHMAD MAAROP AND JEFFREY TAN JJCA
25 NOVEMBER 2009

Criminal Law — Dangerous Drugs Act — ss 6, 12(2) — Whether affirmative finding of possession made out — Whether appellant had knowledge of drugs found in bags — Whether mens rea possession made out — Whether presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 arose

Evidence — Witness — Credibility of — Witness to drug related offences — Whether evidence required by law to be corroborated — Whether trial judge's finding ought to be upheld

Evidence — Witness — Failure of prosecution to call witness — Whether witness essential to unfolding of narrative on which prosecution's case was based — Whether non-calling resulted in procedural unfairness — Whether occasioned in miscarriage of justice

The appellant was charged in the High Court with three charges relating to drug offences. In the first he was charged with trafficking in 32.6g of monoacetylmorphine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). He was convicted and sentenced to death. In the second he was charged with being in possession of 3.99g of methamphetamine under s 12(2) of the DDA read with s 39A of the DDA, convicted and sentenced to five years imprisonment and ten strokes of the rotan. In the third, he was charged with being in possession of 2.02g of cannabis under s 6 of the DDA, convicted and sentenced to four years imprisonment. The sentences for the second and third charges were ordered to run concurrently. Hence this appeal. The appellant's case was that he was deprived of procedural fairness which resulted in a miscarriage of justice. He further contended that he was found by D/L/Kpl Ravidas ('Cpl Ravidas') but Cpl Ravidas was never called by the prosecution as a witness and this had occasioned in a serious miscarriage of justice. It was also contended that SP5's evidence, that he found the appellant squatting and holding the bags ('P13 and P20') and shivering, warranted consideration. The appellant therefore submitted that the learned trial judge had misdirected himself.

Held, dismissing the appeal; affirming the conviction and sentence:

(1) Based on the authorities, it is clear law that the prosecution has a

complete discretion as to the choice of witnesses to be called at the trial subject to the basic limitation. In other words, in the end it is the sufficiency of the evidence that matters. Evidence for the proof of facts in a trial depends on witnesses and their credibility. In this regard, s 134 of the Evidence Act 1950 which enshrines the well recognised principle that witnesses are weighed, not numbered or counted, provides that 'no particular member of witnesses shall in any case be required for the proof of any fact' (see paras 5 & 12).

(2) It was clear from the facts that Cpl Ravidas did not come within the category of 'witnesses essential to the unfolding of the narrative on which the prosecution's case is based'. There was no necessity for the prosecution to call Cpl Ravidas to give evidence. Thus, the contention that the non-calling of Cpl Ravidas by the prosecution had resulted in procedural unfairness to the appellant occasioning in miscarriage of justice was unacceptable (see paras 15–16); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 and *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26 distinguished.

(3) Based on the appeal record, it was clear that SP5's evidence was essential to the unfolding of the narrative on which the prosecution was based and although his evidence not required by law to be corroborated, sufficient corroboration was provided by SP6's evidence. Further, on the evidence of SP5 and SP6, the learned trial judge made the affirmative finding of possession of the proscribed drugs by the appellant. The judge then invoked the presumption of trafficking under s 37(da) of the DDA. There was no doubt that at the material time the appellant had knowledge of the drugs found in P13 and P20 — he had mens rea possession. Therefore the learned trial judge's finding was upheld (see paras 17 & 20).

(4) On the facts, nothing about the breach of the PCO order by the appellant was raised until the prosecution closed its case. Thus, the learned trial judge had not erred in concluding that the appellant's explanation about his fear of the police was because he had contravened the PCO order was the product of an afterthought (see para 23).

(5) The learned trial judge had given the reasons for his conclusion that DW2's evidence did not support the attempt by the defence at creating a reasonable doubt which conclusion was not wrong. The learned trial judge also had adequately considered the defence of the appellant in the light of the evidence adduced by the prosecution and concluded that the appellant failed on the balance of probability to rebut the presumption of trafficking under s 37(da) of the DDA, or raised any reasonable doubt as to the truth of the prosecution's case. The appellate court is always slow to interfere in such findings of fact made by the learned judge (see paras 29–30 & 32).

[Bahasa Malaysia summary

Perayu dituduh di Mahkamah Tinggi dengan tiga pertuduhan berkaitan kesalahan dadah. Dalam tuduhan pertama, dia dituduh dengan mengedar 32.6g monoacetylmorphine, suatu kesalahan yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Dia disabitkan dan dijatuhkan hukuman mati. Dalam tuduhan kedua, dia dituduh memiliki 3.99g methamphetamine di bawah s 12(2) ADB dibaca bersama s 39A ADB, disabitkan dan dihukum lima tahun penjara dan sepuluh sebatan. Dalam tuduhan ketiga, dia dituduh memiliki 2.02g kanabis di bawah s 6 ADB, disabit dan dihukum empat tahun penjara. Hukuman bagi tuduhan kedua dan ketiga diperintahkan berjalan serentak. Justeru rayuan ini. Kes perayu ialah bahawa dia dinafikan keadilan prosedur yang mengakibatkan salah laksana keadilan. Dia seterusnya menghujah bahawa dia dijumpai oleh D/L/Kpl Ravidas ('Kpl Ravidas') tetapi Kpl Ravidas tidak dipanggil oleh pihak pendakwaan sebagai saksi dan ini mengakibatkan ketidakadilan yang serius. Juga dihujahkan bahawa keterangan SP5, bahawa dia menjumpai perayu mencangkung duduk dan memegang beg-beg tersebut ('P13 dan P20') sambil menggeletar, harus dipertimbangkan. Oleh itu perayu menghujah bahawa hakim bicara yang bijaksana telah tersalah arah.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman:

(1) Berdasarkan autoriti-autoriti, adalah undang-undang yang jelas bahawa pihak pendakwaan mempunyai budi bicara mutlak ke atas pemilihan saksi-saksi yang ingin dipanggil semasa perbicaraan tertakluk kepada pembatasan yang asas. Dalam erti kata lain, akhirnya kecukupan keterangan yang penting. Keterangan bagi bukti fakta-fakta dalam suatu perbicaraan bergantung kepada saksi-saksi dan kredibiliti mereka. Dalam hal ini, s 134 Akta Keterangan 1950 yang mencerminkan prinsip yang popular bahawa saksi-saksi yang dipertimbangkan, bukannya berdasarkan jumlah, memperuntukkan bahawa 'no particular member of witnesses shall in any case be required for the proof of any fact' (lihat perenggan 5 & 12).

(2) Adalah jelas daripada fakta-fakta bahawa Kpl Ravidas tidak termasuk dalam kategori 'witnesses essential to the unfolding of the narrative on which the prosecution's case is based'. Tiada keperluan bagi pihak pendakwaan memanggil Kpl Ravidas untuk memberi keterangan. Oleh itu, hujahan bahawa dengan tidak memanggil Kpl Ravidas, telah mengakibatkan ketidakadilan prosedur kepada perayu dan menjurus kepada salah laksana keadilan, tidak boleh diterima (lihat perenggan 15–16); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 dan *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26 dibeza.

(3) Berdasarkan rekod rayuan, adalah jelas bahawa keterangan SP5 adalah penting untuk menggambarkan cerita sebenar yang disandarkan oleh

pihak pendakwaan dan walaupun keterangannya tidak diperlukan oleh undang-undang untuk disokong, sokongan yang mencukupi telah diberikan oleh keterangan SP6. Selanjutnya, atas keterangan SP5 dan SP6, hakim bicara yang bijaksana telah membuat penemuan yang mengesahkan pemilikan dadah yang diharamkan oleh perayu. Hakim kemudiannya menggunapakai anggapan mengedar di bawah s 37(da) ADB. Tidak diragui bahawa pada masa yang material itu perayu mempunyai pengetahuan tentang dadah yang dijumpai dalam P13 dan P20 — dia mempunyai milikan mens rea. Oleh itu, keputusan hakim bicara yang bijaksana disahkan (lihat perenggan 17 & 20).

(4) Daripada fakta-fakta, pelanggaran perintah PCO oleh perayu tidak dibangkitkan sehinggalah pihak pendakwaan menutup kesnya. Maka, hakim bicara yang bijaksana tidak khilaf apabila memutuskan bahawa penjelasan perayu tentang ketakutannya kepada pihak polis disebabkan dia telah melanggar perintah PCO tersebut merupakan sesuatu yang difikirkan kemudian (lihat perenggan 23).

(5) Hakim bicara yang bijaksana telah memberikan alasan-alasan bagi kesimpulannya bahawa keterangan DW2 tidak menyokong percubaan pembelaan menimbulkan keraguan yang munasabah yang mana kesimpulan itu tidaklah salah. Hakim bicara yang bijaksana juga mempertimbangkan dengan secukupnya pembelaan perayu, melihat kepada keterangan yang dikemukakan oleh pihak pendakwaan dan memutuskan bahawa perayu gagal atas imbangan kebarangkalian mematahkan anggapan mengedar di bawah s 37(da) ADB; atau menimbulkan keraguan yang munasabah terhadap kebenaran kes pendakwaan. Mahkamah rayuan selalunya teragak-agak untuk mencampuri penemuan-penemuan fakta yang telah dibuat oleh hakim yang bijaksana (lihat perenggan 29–30 & 32).]

Notes

For a case on ss 6, 12(2) of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 164.

For cases on credibility of witness, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2750–2779.

For cases on failure of prosecution to call witness, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2812–2821.

Cases referred to

Adel Muhammed El Dabbah v Attorney-General for Palestine [1944] AC 156 (refd)

Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)

Chan Chor Shuh v PP [2003] 2 MLJ 26; [2003] 1 CLJ 501, CA (distd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Khoon Chye Hin v PP [1961] MLJ 105, CA (refd)

A *Malak Khan v The King-Emperor* 72 IA 304 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Ouseng Sama-Ae [2008] 1 CLJ 337, CA (refd)
Richardson v R (1974) 131 CLR 116, HC (refd)
B *Seneviratne v The King* [1936] 3 All ER 36, PC (refd)
Teoh Hoe Chye v PP Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (distd)

Legislation referred to

C Criminal Procedure Code s 425
Dangerous Drugs Act 1952 ss 6, 12(2), 37(da), 39A, 39B(2), 40

Gobind Singh Deo (Gobind Singh Deo & Co) for the appellant.
Fatnin bt Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
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Ahmad Maarop JCA:

THE CHARGES

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[1] The appellant was charged in the High Court with three charges. In the first he was charged with trafficking in 32.6g of monoacetylmorphine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). He was convicted and sentenced to death. In the second he was F charged with being in possession of 3.99g of methamphetamine under s 12(2) of the DDA read with s 39A of the same Act, convicted and sentenced to five years imprisonment and ten strokes of the rotan. In the third he was charged with being in possession of 2.02g of cannabis under s 6 of the DDA, convicted and sentenced to four years imprisonment. The imprisonment G terms on the second and the third charges were ordered to run concurrently. He appealed to this court.

THE PROSECUTION'S CASE

H **[2]** Briefly the prosecution's case is as follows. On 23 July 2003 at about 6am, acting on information received, Chief Inspector Arman bin Ibrahim ('SP5') assembled a police party consisting of personnel from the Narcotic Division from the Johor Bahru Police District Headquarters ('IPDJB') for a raid on a house at No 50C, Kg Hajjah Fatimah, Batu 3 1/2 Jalan Tampoi, I Majidee, Johor Bahru ('the premises'). SP5 divided the police party into two teams. The first team, comprising of himself, Sjn Zulkifli, D/Kpl Jasmani bin Ali Othman ('SP6'), D/Kpl Misnudin, D/L/Kpl Roslan and D/L/Kpl Wanita Suzaila, was tasked with entering the premises. The second team comprising of Inspector Chee Kar Woh, D/SM Alias, D/Sjn Misbah, D/Kpl Ravidas,

D/Kpl Goh Kwang Beng and D/L/Kpl Wanita Mariani, was assigned the task of patrolling the outside perimeter of the premises. The police party led by SP5 then proceeded to the premises. Upon arrival at the premises at about 7.15am, the two police teams took up the positions respectively assigned to them. SP5 together with the first team knocked at the front door but there was no response. SP5 kicked the door open and together with the first team entered the premises. SP5 saw two Malay women identified later as Ainon bt Asim ('SP4'), Diana bt Jamaludin ('DW2'), a young female child (Nadia — Diana's daughter) and Muhamad Qamal bin Jamaludin in the hall. SP5 introduced himself to them. A body search was conducted on them, but nothing incriminating was found. SP5 then proceeded to conduct a search of the whole premises. When SP5 entered the second room, he heard human movements behind the wooden wall of the room. Upon examination, he found a sliding panel on the wooden wall covering a window. He pushed apart the panel and opened the window which led to a dark alley. He shone a torch light into the alley and saw the appellant squatting on the floor holding a blue sling bag in his left hand and a white plastic bag on his right hand. The appellant was shivering. SP5 directed SP6, D/Kpl Misnudin and D/L/Kpl Roslan to enter into the dark alley and bring the appellant out into the second room. The appellant was brought into the second room through the window with the assistance of D/Kpl Roslan. SP5 took the sling bag ('P13') from the appellant's left hand and the plastic bag ('P20') from his right hand. PW5 found the incriminating dangerous drugs which formed the subject matter of the three charges in the sling bag and the plastic bag. SP5 handed the drugs over to Inspector Muhammad Johar bin Yusof ('SP7'), who later sent them to the chemist, Abdullah bin Mohd Yusof ('SP3') for analysis. On analysis SP3 confirmed the identity and quantity of the drugs to be as follows:

(a) 32.6g of monoacetylmorphine;

(b) 3.99g of methamphetamine; and

(c) 2.02g of cannabis.

Monoacetylmorphine, methamphetamine and cannabis are dangerous drugs under the DDA.

THE APPELLANT'S DEFENCE

[3] The appellant gave evidence on oath and called his daughter ('SD2') as his witness. The substance of the appellant's defence is as follows. He did not deny that he was hiding in the alley when the police came to his house in the morning of 23 July 2003. He testified that he hid himself in the alley when he detected the presence of the police outside his house at 7am. He said he hid himself because he was in breach of the PCO order made against him — under that order he was supposed to report himself in Kelantan. He said he

had not complied with the PCO order since December 2002. He said he had not brought anything with him into the alley except a pair of trousers and he was only wearing an underwear and a T-shirt. He claimed that he came out of the alley after being asked by an Indian policeman named Ravidas (Kpl Ravidas) who was the police personnel who saw him. He said Kpl Ravidas did not go into the alley, and that he (the appellant) came out from the alley into the room through the window without carrying anything. There were five policemen in the room. They did not identify themselves. He was then handcuffed. Then two policemen each armed with a rotan, beat him. One of them then asked the appellant, 'Di mana barang'. The appellant said he kept quiet because he did not know. Then he said one of the policemen who was in alley showed him two bags and told him, 'Ini kamu punya'. He did not reply. He said he had never seen the two bags and the contents before. He denied that he was squatting in the alley holding P13 and P20. He denied that both bags belonged to him. He also disagreed that three policemen entered the alley and that he was brought out of the alley into the room through the window by the three policemen and was received by SP5 who opened the two bags in his presence.

SUBMISSION OF LEARNED COUNSEL FOR THE APPELLANT

[4] The crux of the submission made by learned counsel for the appellant before us was that in the trial in the court below the appellant was deprived of procedural fairness which resulted in a miscarriage of justice. Learned counsel submitted that in finding that the prosecution had made out a prima facie case of actual possession, the learned trial judge relied on the testimony of SP5 and SP6. Learned counsel pointed out that SP5 testified that he found the appellant squatting on the floor in the alley behind the wooden wall of the second room, holding a sling bag ('P13') on his left hand and a plastic bag (P20) in his right hand, and that the appellant was shivering. Learned counsel submitted that the testimony of SP5 and SP6 was challenged by the defence in cross-examination. It was the case for the defence that the appellant was not found by PW5 at the material time, but by D/L/Kpl Ravidas. It was also the defence case that although it was true that the appellant was found in the alley, he did not have any bag in his hands. Thus, learned counsel submitted that in essence, the version led by the defence went to the credibility of SP5 and the narrative of the case for the prosecution. Learned counsel contended that if it were true that SP5 did not find the appellant as said by him, then his testimony that P13 and P20 were found in the hands of the appellant could not be believed. According to him, what therefore warranted consideration was whether SP5's evidence that he found the appellant squatting and holding the bags and shivering, was true. Learned counsel argued that despite a clear challenge by the defence by naming D/L/Kpl Ravidas, he was never called by the prosecution as a witness to deny the

suggestion by the defence that the appellant was not found by SP5, but by D/L/Kpl Ravidas. Learned counsel said that it was not in dispute that D/L/Kpl Ravidas did in fact exist and that he was one of the officers who participated in the raid of the appellant's house that morning, but the learned trial judge, despite not hearing D/L/Kpl Ravidas found SP5 to be a witness of credit and rejected the defence version. Learned counsel submitted that the learned trial judge had misdirected himself. He argued that the learned trial judge ought to have held that the failure of the prosecution to call D/L/Kpl Ravidas to give evidence occasioned a serious miscarriage of justice in that it deprived the appellant of that most valuable opportunity to establish the truth of his version through D/L/Kpl Ravidas which would have struck down the case for the prosecution and the credibility of SP5 and SP6. Continuing his submission learned counsel said:

> The law as regards the calling of witnesses is well laid down in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433. There the court held:
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> > We recognise that the function of the prosecution is to prosecute, and does not mean that it must discharge the functions both of the prosecution and the defence.
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> > On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not (see *Teh Lee Tong v Rex* [1956] MLJ 194). *The discretion, however must be exercised having regard on the interests of justice, which includes being fair to the accused* (per Lord Parker CJ in *R v Oliva* [1965] 3 All ER at p 122; [1965] 2 WLR 1028 at p 1035), and to call *witnesses essential to the unfolding of the narrative on which the prosecution case is based*, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 p 49, applied in *R v Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789.
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> > This case also made reference to the Australian case of *Richardson v R* (1974) 131 CLR 116 in which the High Court of Australia said:
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> > What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors, and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably *with the dictates of fairness to the accused*.
> >
> > It is respectfully submitted the learned judge adopted the wrong approach. His Lordship did not direct his mind to the issue of fairness to the accused in ruling that it was not necessary for the prosecution to call D/LP Ravidas. His Lordship concerned himself only with case for the prosecution not realising that the decision not to call D/LKP Ravidas had an equally if not more important impact upon the defence as described earlier. His Lordship assumed that evidence of D/LKP Ravidas would be of no use to the defence. This was clearly wrong.
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> > Whilst it is true that D/LKP Ravidas was offered to the defence, this, it is respectfully submitted, makes no differences as what is important is the opportunity on part of the defence to cross-examine D/LKP Ravidas.

In *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; [2003] 1 CLJ 501, the Court of Appeal said:

> We are of the view that it is an erroneous view to suggest, as the trial judge did, that is is immaterial as to who arrested, the appellant — whether ASP Luthfi or PC Yap. With respect, thus, we feel it tantamount to riding rough shod over the evidence. To us it would matte as to who effected the arrest, as *it would have a bearing on the prosecution's narrative*. The fact that PC Yap was not called as a witness by the prosecution in this instance, but *merely offered to the defence, would, we hold, have a material effect on the case for the prosecution*.

DECISION

[5] The submission made by learned counsel brought into sharp focus the law relating to the calling of witnesses in a criminal prosecution. It is of course well settled that in a criminal case the prosecution, provided that there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of its case a witness whom it does not believe to be a witness of truth (see *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 at p 109 (CA), *Adel Muhammed El Dabbah v Attorney-General of Palestine* [1944] AC 156, *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at pp 70–71). In the of-cited case of *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156 at p 168 Lord Thankerton observed:

> The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

[6] In the case of *Malak Khan v The King-Emperor* 72 IA 304 at p 314 Lord Thankerton repeated in effect what he had said in *Adel Muhammed El Dabah* when he observed:

> There is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution.

[7] Some years earlier in *Seneviratne v The King* [1936] 3 All ER 36 at p 49, Lord Roche delivering the judgment of the Privy Council in an appeal from Ceylon said that:

> Witnesses essential to the infolding of the narratives on which the prosecution is based, must of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

That statement by Lord Roche (which was referred to in the Federal Court case of *Ti Chuee Hiang v Public Prosecutor*) was also relied on by learned counsel in support of his submission.

[8] As would be recalled, in support of his submission, learned counsel also relied on the following remark by the High Court of Australia in the case of *Richardson v R* (1974) 131 CLR 116:

> What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors, and, in the light of those factors, to determine the course which will ensure a proper prosecution of the crown case conformably with the dictates of fairness to the accused.

It appears that that remark constituted the main plank of learned counsel submission that the appellant was deprived of procedural fairness. In order to consider the true effect of the judgment in *Richardson v R* and to see the context in which the aforesaid remark was made, we set out the part of the judgment in which the remark occurred:

> Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witness who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few.
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> *What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused*. It is in this sense that it has been said that the prosecutor has a discretion as to what witnesses will be called for the prosecution. *But to say this is not to give the prosecutor's decision the same character as the exercise of a discretionary power or to make his decision reviewable in the same manner as those discretions are reviewable*. In the context the word 'discretion' signifies no more than that the prosecutor is called upon to make a personal judgment, bearing in mind the responsibilities which we have already mentioned.
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> *It is, therefore, a misconception to speak of the prosecutor as owing a duty to the accused to call all witnesses who will testify as to the events giving rise to the offence charged. The misconception has arisen, we venture to think, from treating some observations in the decided cases, which have been made with the intention of offering guidance to prosecutors in how they are to approach their task, as the prescription of an inflexible duty to call all material witnesses, subject to certain exceptions or to special*

> *circumstances*. Although the pursuit of certainty may have its advantages, the rigid circumscription of a practical decision to be made by the Crown prosecutor in the conduct of the Crown case is not to be numbered among them. (Emphasis added.)

In other words, according to the Australian High Court, it is a misconception (in the context of aforesaid remark) to talk about the prosecution owing a duty to an accused person to call all witnesses who will testify as to the events giving rise to the offence charged. The misconception developed because some observations in the decides cases were treated as prescribing an inflexible duty to call all material witnesses, when the observations had been made with the intention of offering guides to the prosecution as to how it was to approach its task. The Australian High Court in that case also referred to the statement made by Lord Roche in the case of *Seneviratne v The King* that 'Witnesses essential to the unfolding of the narratives on which the prosecution is based, of course, be called by the prosecution, whether in the result the effect of that testimony is for or against the case for the prosecution', and made the following observations which we find illuminating:

> With this statement we would agree, but so as to avoid any misapprehension we would wish to make two observations about it. *First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owed by the prosecutor to the accused. Secondly*, there is room for some debate as to what is meant by the opening words of the statement and *it would not be read as inhibiting the discretion which the prosecutor has not to call in the Crown case an eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness*. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.
>
> *It follows that a failure on the part of the Crown prosecutor to call in the Crown case an eye-witness of the incidents giving rise to the offence charged does not of itself constitute a ground for setting aside a conviction and ordering a new trial*. Counsel for the applicant was unable to point to any authority for the proposition for which he contended and, in the light of what we have said, it finds no support in principle or in the nature and character of the decision which the prosecutor is called upon to make. Once it is acknowledged that the prosecutor has a discretion and that there is no rule of law requiring him to call particular witnesses, it becomes apparent that the decision of the prosecutor not to call a particular witness can only constitute a ground for setting aside a conviction and granting a new trial if it constitutes misconduct which, when viewed against the conduct of the trial taken as a whole, gives rise to a miscarriage of justice. (Emphasis added.)

[9] Indeed, the statement made by Lord Roche in *Seneviratne v The King* that 'witnesses essential to the unfolding of the narratives on which the prosecution is based must be called by the prosecution', must be considered in the light of what His Lordship said preceeding the statement:

... Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; *but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination*. (Emphasis added.)

[10] Reference must now be made to *Ti Chuee Hiang v Public Prosecutor*. In that case after examining familiar cases on the subject of the calling of witnesses in criminal prosecution including *Seneviratne v The King*, *Adel Muhammed el Dabbah* and *Richardson v R*, the Federal Court made the following conclusion:

Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation — which is nothing less than a statutory duty — the accused must be acquitted.

[11] Thus, in *Teoh Hoe Chye v Public Prosecutor Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p 229:

Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v Public Prosecutor*). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).

[12] From what have been demonstrated thus far, it is clear law that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial subject to the basic limitation that it has a duty to call all of the necessary witnesses to discharge its burden of proving the case against the accused beyond reasonable doubt. In other words, in the end it is the sufficiency of the evidence that matters. Evidence for the proof of facts in a trial depends on witnesses and their credibility. In this regard, s 134 of the

Evidence Act 1950 which enshrines the well recognised principle that witnesses are weighed, not numbered or counted (*testes ponderantur, non numerantur*), provides that 'no particular member of witnesses shall in any case be required for the proof of any fact'. In the present case to prove its case the prosecution called SP5 and SP6 to give evidence. When we discussed the prosecution's case we have set out the substance of SP5's evidence. SP5 was the police officer who led the raid on the premises. To recount his evidence, upon arrival at the premises SP5, who was with the first team, knocked at the front door. After getting no response he kicked the door open and entered the premises with the first team. He saw two Malay women (SP4 and DW2), DW2's daughter and the appellant's son in the hall. A body search was conducted on them but nothing incriminating was found. SP5 then proceeded to conduct a search of the whole premises but nothing incriminating was found. When SP5 entered the second room, he heard human movements behind the wall covering a window. He pushed apart the panel and opened the window which led to a dark alley. He shone a torch light into the alley and saw the appellant squatting on the floor holding a blue sling bag in his left hand and a white plastic bag on his right hand. The appellant was shivering. SP5 directed SP6, D/Kpl Misnudin and D/L/Kpl Roslan to enter into the dark alley and bring the appellant out into the second room. The appellant was brought into the second room through the window with the assistance of D/Kpl Roslan. SP5 then took the sling bag (P13) from the appellant's left hand and the plastic bag (P20) from his right hand. PW5 found the incriminating dangerous drugs which formed the subject matter of the three charges in the sling bag and the plastic bag. SP5 handed the incriminating drugs over to Inspector Muhammad Johar bin Yusof ('SP7'), who later sent them to the chemist, Abdullah bin Mohd Yusof ('SP3') for analysis.

[13] In making maximum evaluation of the credibility of SP5, the learned trial judge considered the issue as to the presence of Kpl Ravidas in the second room and the suggestion by the defence in the cross-examination of SP5 that it was Kpl Ravidas and not SP5 who spotted the appellant in the dark alley and requested him to come out. This issue was central to the defence. The learned trial judge found that the evidence of SP5 was amply corroborated by the evidence of SP6. This is what the learned judge said:

> The issue of the necessity for the prosecution to call Kpl Ravidas to refute the defence suggestion arose in cross-examination of SP5 that it was Kpl Ravidas and not SP5 who spotted the accused in the dark alley and requested him to come out.
>
> In the context herein not only did SP5 denied the suggestion of defence but his testimony that Kpl Ravidas was in group 2 tasked with guarding the house from the outside and that it was SP5 that shorn the torchlight in the alley and spotted the accused in a squatting position holding the 'bag galas' (A13) in his left hand and the plastic bag (P20) in his right hand was amply corroborated by the evidence

of SP6 (D/Kpl Jasmawi) who was one of the policeman who was ordered by SP5 to enter the dark alley to retrieve the accused and the 'bag galas' and 'bag plastik' held by him.

SP6 testified that he and L/Kpl Roslan and Kpl Misnudin entered into the dark alley after being informed by SP5 (Inspektor Arman) that he saw the accused in a squatting position. He approached the accused and asked him to stand upright and bring whatever he was holding in his hand to the window and L/Kpl Roslan carried the accused over the window and was received by Inspektor Arman in the room whereupon a search was conducted over the P13 and P20 held by the accused which search revealed the offending drugs the subject matter of the charge.

It is pertinent to note that SP6 in cross-examination reiterated that Kpl Ravidas was in Group 2 and members of Group 2 did not at any time enter the house. The suggestion that Kpl Ravidas was the person who shorn the torchlight and saw the accused in the alley was denied by SP6.

[14] Having considered the evidence of SP5 and SP6 in the appeal record we agree with the learned trial judge. SP5's evidence was essential to the unfolding of the narrative on which the prosecution was based. His evidence, the substance of which we have set out, provides complete narration of what happened in the arrest of the appellant at the premises and the seizure of the proscribed drugs forming the subject matter of the three charges in this case. SP5 is not a type of witness whose evidence is required by law to be corroborated. Nonetheless, sufficient corroboration is provided by PW6's evidence. SP6 was in the first team which entered the premises. He testified that he was the first person to enter the alley on being directed by SP5 who told him that he saw the appellant in a squatting position. The relevant part of SP6's evidence is as follows:

Insp. Arman menyuluh ke dalam ruang tersebut menggunakan lampu suluh — dia beritahu saya dia nampak seorang lelaki Melayu sedang bercangkung.

Dia mengarahkan saya, Kpl. Misnuddin dan L/Kpl. Roslan masuk dalam ruang tersebut mendapatkan lelaki tersebut.

Saya pertama masuk dan terus pergi ke lelaki tersebut dan suruh dia berdiam diri dan tidak melakukan apa-apa tindakan.

Saya arahkan dia tegakkan diri ke dinding dan saya melangkah ke sebelah kanan dia. Saya minta dia bangun dan bawa apa yang ada di tangan dia masa itu pergi ke tingkap.

Sampai di tingkap L/Kpl. Roslan mengangkat OKT ke tingkap dan disambut oleh Insp. Arman. OKT masuk ke dalam bilik dulu, diikuti oleh L/Kpl. Roslan, Kpl. Misnuddin dan saya.

Keadaan dalam ruang tidak berapa jelas — bergantung kepada lampu suluh — bila pegang OKT semasa dalam keadaan mencangkung — dia menggigil. Dalam bilik Insp. Arman menjalankan pemeriksaan ke atas OKT.

Dari tangan kiri OKT Insp. Arman merapas 1 beg galas — dan apabila diperiksa dalamnya ada dadah.

[15] It is clear from SP5's and SP6's evidence that Kpl Ravidas was not the police personnel who spotted the appellant in the alley and asked him to come out as suggested by the defence. In fact, from SP5's and SP6's evidence, Kpl Ravidas was never in the house at the material time because he was in the second team which had been assigned the task of patrolling outside the house. In our judgment, Kpl Ravidas, (who was offered to the defence at the close of the prosecution case), did not come within the category of 'witnesses essential to the unfolding of the narrative on which the prosecution case is based'. The facts of the present case and those in *Ti Chuee Hiang* and *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; [2003] 1 CLJ 501 are poles apart. In *Ti Chuee Hiang*, the Federal Court found that the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur, for it was he who had put the appellant in touch with the undercover agent, Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus, he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the DDA. In these circumstances, the Federal Court held that he came within the category of witnesses described by Lord Roche in *Seneviratne*, as 'witnesses essential to the unfolding of the narratives on which the prosecution case is based'. The same might be said of the informer's friend. Yet, neither the so-called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution, or even made available to the defence to be called as defence witnesses, nor any explanation vouchstated to the trial judge for these glaring omissions. In *Chan Chor Shuh v Public Prosecutor*, which was also cited by learned counsel for the appellant, this court found that the one Wong Lou Kat in that case was present at the time of the appellant's arrest and there was communication between him and the appellant, prior to the appellant's arrest by the police. In the Court of Appeal's view, this was not the usual run of the mill case, when the police merely acted on a tip-off by an informer, who was invariably not present, but was a case where the informer was not only present prior to the arrest, but was in dialogue with the appellant prior to the arrest, and had dealing with the appellant as regards the hiring of the car prior to the arrest of the appellant. In the circumstances of that case, the Court of Appeal held that the trial judge's rejection of the need to call Wong Low Wat based on the fact that he was an informer was misplaced, and that Wong Low Wat should have been called as a witness, or at least offered to the defence.

[16] Reverting to the instant appeal, as we have demonstrated, on the evidence available, Kpl Ravidas was not even in the house at the time of the appellant's arrest. In our view, his evidence was not essential to the unfolding of the narrative on which the prosecution case was based. There was no necessity for the prosecution to call Kpl Ravidas to give evidence, just because it was put to SP5 and SP6 under cross-examination that he (Kpl Ravidas) was the person who spotted the appellant in the alley and requested him to come out. Thus, we cannot accept learned counsel's contention that the non calling of Kpl Ravidas by the prosecution had resulted in procedural unfairness to the appellant occasioning a miscarriage of justice.

[17] Based on the evidence of SP5 and SP6, the learned trial judge made the affirmative finding of possession of the proscribed drugs by the appellant as required by *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 (FC). The learned trial judge then invoked the presumption of trafficking under s 37(da) of the DDA. In *Public Prosecutor v Ouseng Sama-Ae* [2008] 1 CLJ 337 Gopal Sri Ram JCA (Now FCJ) delivering the judgment of this court held:

> Now, in order to establish a prima facie case against the accused by reliance on the presumption under s 37(da) of the Act, the prosecution had to prove: (i) *that the accused was in actual physical possession of the drug in question; and (ii) that the accused at the material time had knowledge of the drug found to be in his possession, that is to say that he had 'mens rea possession'*: see *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72. *The first element was easily established here because the accused did have custody and control of the bag. Indeed, it is quite clear from the evidence that he was exercising dominion over exh P18 at all material times*. The only question is whether he had mens rea possession. Like any other mental ingredient in an offence, this is to be inferred from the proved and admitted facts of each case. (Emphasis added.)

[18] Similar approach was applied by the learned trial judge in the instant appeal. First, he considered whether the appellant was in actual physical possession of the drugs in question. This is what he said in his judgment:

> *On issue of possession*
>
> *On this issue I am satisfied that the prosecution has successfully proved the physical and mental element of possession which leads me to hold that the accused was in actual possession*. The factual matrix adduced through prosecution's witnesses in particular SP5 and SP6 revels that accused was found holding P13 and P20 in his hands — it was in his physical possession and hence he had custody and control over it. Both SP5 and SP6 are to my mind non-partisan witnesses who had nothing to gain nor any motive to suppress the truth. I accepted their evidence as credible. I accept as the truth the evidence of SP5 and SP6 that they saw the accused holding P13 and P20 in his hands.

[19] Having considered SP5's and SP6's evidence on the arrest of the appellant and the recovery of P13 and P20 from the appellant's hands ourselves, we agree with the learned trial judge. Then, the learned trial judge considered the second element — whether the appellant had mens rea possession. This is what he said:

> As regards the mental element — ie knowledge of contents of P13 and P20 can only be proved by inference from surrounding circumstances — relevant factors are from where the drugs were found, how it was recovered, reaction of the accused, the manner it was kept and weight of the drugs — see *Surenthiran Selvaraju v Public Prosecutor* [2005] 2 CLJ 264.
>
> In this connection the factor of the accused hiding in the dark alley behind a false wall panel holding in his hand P13 which is not locked and P20 the plastic bag and the factor of the weight of the drugs ie 32.6g of monoacetylmorphine are pointers that the drugs are clearly not for his personal consumption. Though his reaction on shivering is by itself not evidence of knowledge nevertheless taking into consideration that the drugs were found in P13 and P20 which was physically held by him in his hands and the amount of drugs recovered to my mind has the cumulative effect of establishing the mental element of knowledge which leads me to conclude that the prosecution has successfully establish that the accused actually knew the nature of the offending exhibits found in P13 and P20.
>
> By reason thereof the presumption of trafficking under s 37(da) arises. I am satisfied that at the close of the prosecution's case a prima facie case has been made out and hence the accused is called upon to enter his defence on all three charges.

[20] On the evidence available we too have no doubt that at the material time the appellant had knowledge of the drugs found in P13 and P20 — he had mens rea possession. We therefore uphold the learned trial judge's finding as aforesaid.

[21] In his submission learned counsel also complained that the learned judge did not view the evidence from all angles as a result of which the appellant was prejudiced. In this regard, the first point argued was based on the learned trial judge's remark at pp 67–68 of his judgment:

> It is also interesting to note that *the defence never at any time suggested to SP4 who is the accused's wife that Kpl Ravidas was in the room* and hence the suggestion of Kpl Ravidas shorning the torchlight into the alley and seeing the accused cannot have much weightage for the reason Kpl Ravidas was never in the house to be doing the suggestion proferred by the defence.

Learned counsel submitted that the learned judge did not appreciate the fact that PW4 had said in her evidence that she was in the wash room when the police raided her house and that when she came out, the appellant was already in the room. Thus the question of suggesting to her about matters which occurred before she came out of the washroom did not arise. We do

not see how that remark by the learned judge had prejudiced the appellant. We find that the important thing about that remark is the learned judge's conclusion that the defence suggestion of Kpl Ravidas shining the torchlight into the alley and seeing the appellant could not have much weight because Kpl Ravidas was never in the premises at the material time. The fact that Kpl Ravidas was never in the premises at the material time was clearly established by SP5's and SP6's evidence which the learned judge accepted as credible. Further, we do not think that the learned judge's observation that the defence never at any time suggested to PW4 that Kpl Ravidas was in the room, was inappropriate. It is important to note that the learned judge did not say that the defence never at any time suggested to PW4 that Kpl Ravidas was the one who spotted the appellant in the alley and asked him to come out (which suggestion was put to PW5 and PW6). What the learned judge did say in the aforesaid remark was that the defence never at any time suggested to SP4 that Kpl Ravidas was in the room. Now, PW4's evidence was that when she came out of the washroom, she saw 'anggota serbuan' ada dalam rumah. She also said that when she came out of the washroom she saw the appellant being surrounded by the narcotics personnel and that she saw them beating the appellant. If PW4's evidence were true, that would have occurred shortly after the appellant was brought out from the alley, and if it were true that Kpl Ravidas was the one who spotted the appellant in the alley it is most reasonable to say that he was still in the premises and was at or near the police personnel where the appellant was allegedly assaulted, unless immediately after spotting the appellant in the alley (as claimed by the defence), Kpl Ravidas went out of the premises. Yet, there is nothing in SP4's evidence in examination in chief to show that Kpl Ravidas was in the premises. She was also not asked in cross-examination whether Kpl Ravidas was in the premises.

[22] The next criticism of the learned judge's judgment arose from the following passage about the alleged PCO order being predicated by an afterthought:

> On the issue of the accused reaction of shivering was occasioned by his contravention of his PCO order for restricted residence at Pasir Putih Kelantan is a submission predicated by an afterthought as it was not only brought up after the close of the prosecution's case but the investigating officer clearly stated that at no time was he informed by the accused that he was under a PCO order and hence in the absence thereof the investigation officer was clearly under no obligation to investigate that aspect of him being under restricted order.

Learned counsel submitted that the learned judge fell into error here as the evidence led suggested that the appellant did inform the investigation officer ('SP7') about the PCO order which SP7 found, on his investigation, to be true.

[23] It is plain that the breach of the PCO order was a very important element in the defence of the appellant, because it was the reason which he gave in his evidence in explaining why he hid in the alley when he heard the presence of the police outside his house at 7am. If it were true that he hid in the alley because he did not want to be caught by the police because he had breached the PCO order since December 2002, surely such a crucial matter would not have slipped from his mind, and that surely he would want to raise it at the first opportunity available. Yet, surprisingly, nothing about the breach of the PCO being the reason why he had hid in the alley was ever put to SP5 or SP6 when they testified. Nothing about the same was put to SP7 when he gave evidence before the prosecution closed it case. In fact, until the prosecution closed its case, nothing at all was raised about the PCO order. Then, after the prosecution closed its case on 16 February 2007, the trial was adjourned to 9 March 2007 for submission. On 9 March 07, instead of opening his submission, learned counsel who represented the appellant in the court below, applied to the court under s 425 of the Criminal Procedure Code to recall SP7 so that he could be cross-examined further about the PCO order on the appellant. That was the first time the issue of the PCO order surfaced in the trial. Over the objection of learned DPP, the court allowed SP7 to be recalled. In his evidence when he was recalled, SP7 said when he conducted investigation he did not know that the appellant was subject to a PCO order. SP7 testified that the appellant did not inform him that he (the appellant) was subject to a PCO order. The police personnel involved in the raid on the premises also did not inform SP7 about it. According to SP7, it was after the trial that he received notice from the appellant's lawyer about the PCO order:

> Tidak tahu OKT di bawah perintah sekatan semasa siasatan. Ya, selepas perbicaraan saya ada terima notis daripada peguam OKT mengenai perintah sekatan.

SP7's evidence on recall established that there was a PCO order on the appellant for 18 months from 26 December 2002 to Jun 2004, under which the appellant was required to reside in Pasir Putih, Kelantan. However the recall of SP7 did not help the appellant's case. The important question (for which no explanation was provided by the appellant in his evidence) is — if it were indeed true that he hid in the alley on hearing the presence of the police and he was shivering because he was scared of getting caught because he had breached the PCO order, why was that not put to SP5, SP6 and SP7 before the prosecution closed its case on 16 February 2007? In the light of the circumstances which we have just set out, the learned trial judge had not erred when he concluded that the appellant's explanation about his fear of the police because he had contravened the PCO order was the product of an afterthought.

[24] The next criticism ventilated by learned counsel concerned the learned judge's conclusion that the evidence of DW2 did not support the defence attempt at creating a reasonable doubt. In support of his submission that the learned judge ought not to have rejected DW2's evidence, learned counsel contended that the learned judge erred in respect of the three reasons he gave for his aforesaid conclusion. First, learned counsel referred to the learned judge's remark that the appellant had said that Kpl Ravidas did not go into the alley, whereas DW2 said that he did. Learned counsel contended that that was not correct because the appellant made no mention about whether or not Kpl Ravidas entered the alley as said by the learned judge. According to learned counsel what the appellant said was:

> Setelah anggota polis jumpa saya dalam lorong dan suruh saya keluar, saya pun keluar.
>
> Seorang anggota polis India yang suruh saya keluar — namanya Ravidas. Dia berada di tingkap bila suruh saya keluar. Saya keluar dari lorong menerusi tingkap tanpa membawa apa-apa.

[25] We do not think the learned judge was wrong when he made the remark because although it is true that in the above passage the appellant made no mention about whether or not Kpl Ravidas entered the alley, under cross-examination the appellant said:

> Ya, setuju tiada penglihatan dalam lorong kerana gelap. *Tidak setuju kerana keadaan gelap saya kata yang masuk ialah Ravidas*.

The appellant disagreed that because it was dark (in the alley) he said the one who entered (the alley) was Ravidas. In other words he denied that Kpl Ravidas entered the alley.

[26] Learned counsel next referred to the following passage in the judgment of the learned trial judge:

> DW2's evidence does not in any way support the accused testimony that it was the police who brought P13 and P20 into the room bearing in mind her testimony that she could see the going on in the room from the hall where she was standing.

Learned counsel submitted that the learned judge made a mistake here because DW2 actually said that she could not see what was happening inside the room from the hall:

> Dari ruang tamu tidak dapat melihat kejadian dalam bilik.

It is clear that evidence by DW2 was referred to by the learned judge when he made the impugned remark. Obviously therefore, there was a typographical error in that remark made by the learned judge with reference

to DW2's evidence as aforesaid, in that the word 'not' was left out after the word 'could'. It must be so, otherwise the remark made no sense. In any case having considered the totality of DW2's evidence ourselves, there was another and more important reason for the learned judge's conclusion that DW2's evidence did not in anyway support the appellant's evidence that it was the police who brought P13 and P20 into the room. It is this — we find nothing in DW2's evidence to show or even raise a reasonable doubt that it was the police who brought P13 and P20 into the room as claimed by the appellant. In fact there was no reference at all about P13 and P20 in DW2's evidence.

[27] Learned counsel also referred to the following passage in the learned judge's judgment:

> DW2's evidence that at the point of the police entry into the house her daughter woke up after she woke up contradicts the accused testimony that DW2's daughter was with him.

Learned counsel contended that that was not true. In support of his submission he referred to the following evidence given by DW2:

> Polis masuk ke ruang tamu dengan menendang pintu. Saya dan anak saya ada di ruang tamu ...

He then referred to the following evidence by the appellant:

> Selain isteri saya ada lagi 3 orang iaitu anak lelaki, anak perempuan dan cucu perempuan saya pada pagi itu.

[28] It appears to us that learned counsel had missed the following evidence given by DW2 and the appellant. Under cross-examination DW2 said:

> Tidak setuju saya bohong. Pada hari kejadian saya bangun tidur hampir 7.00 pagi. Perkara penting sahaja saya ingat.
>
> *Selepas saya bangun anak saya bangun*.

DW2's evidence which we have underlined contradicted the following evidence by the appellant under cross-examination:

> Semasa kejadian saya tidak tahu di mana keluarga saya berada *kecuali cucu saya berada di hadapan saya*.

So, the learned judge had not erred when he made the remark which was criticised by learned counsel.

[29] Rounding up his submission, learned counsel submitted that the learned trial judge ought to have accepted DW2's evidence which would have

corroborated the evidence of the appellant that SP5 and SP6 were not telling the truth, and that it was actually D/Lkp Ravidas who found him in the alley on the night in question. This, learned counsel argued would have led to the appellants version being highly probable which, weighed against the failure of prosecution to call D/Lkp Ravidas, would have led to the defence succeeding in raising a reasonable doubt in the case for the prosecution for which the appellant ought to have been acquitted and discharged. The learned trial judge had given the reasons for his conclusion that DW2's evidence did not support the defence attempt at creating a reasonable doubt, which conclusion, as we have demonstrated at some length, was not wrong.

[30] We find that the learned trial judge also had adequately considered the defence of the appellant in the light of the evidence adduced by the prosecution and concluded that the appellant failed on the balance of probability to rebut the presumption of trafficking under s 37(da) of the DDA, or raised any reasonable doubt as to the truth of the prosecution's case. This is what he said:

> The whole scheme of the accused defence is one of denial — denial of holding P13 and P20 in his hands, denial of having knowledge as to the contents of P13 and P20 which he asserts was found in the alley after he had come out of the alley and into the room, denial that it was SP6 and not Kpl Ravidas who found him in the alley and denying that it was three police personnel that entered into the alley and seeing him holding P13 and P20. The denial aforesaid does not to my mind cast a reasonable doubt on the prosecution's case — see *Public Prosecutor v Hassan bin Salip Hashim & Anor* [1993] 2 CLJ 551.
>
> In my judgment the case of *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; [2003] 1 CLJ 501 (CA) relied on by learned defence counsel is distinguishable on its facts. There the court found many infirmities in the prosecution's case whereas in the case at hand I have made the finding that SP5 and SP6 are witnesses of truth. The issue of Kpl Ravidas presence in the room does not and cannot to my mind create a reasonable doubt.

[31] Further, the learned judge also concluded that the appellant defence was an afterthought as regards the issue of the PCO order and the existence of the two canes which was allegedly used by the police to beat the appellant. This is what he said:

> Further it is my finding that the accused defence was an afterthought as regards both the issue of the PCO and the existence of the two canes that was allegedly used to beat the accused in that the PCO issue was raised after the prosecutions closed its case and no cross-examination was made to the raiding party. The issue of the existence of the two canes which was allegedly used to beat the accused was never put to any of the prosecution's witness. As was stated in the case of *Hamidon bin Mat Yatim v Public Prosecutor* [1995] 3 CLJ 724:

A question were not put to Rasul in the course of cross-examination ... and subsequently they can be dismissed as mere afterthought.

B **[32]** The conclusions of the learned judge as aforesaid were based on his finding on the credibility or otherwise of the prosecution witnesses particularly SP5 and SP6, and of the appellant as well as his witness, in respect of which, his views as the trial judge is entitled to great respect. The appellate court is always slow to interfere in such findings of fact made by the learned judge (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644).

C In order to reverse the decision of the learned trial judge on such matters we must, not merely entertain doubt whether his decision was right, but be convinced that it was wrong (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 275). Having carefully scrutinised the evidence on record, and having carefully examined the judgment of the D learned trial judge, and for reasons which we have set out at length in this judgment, we cannot agree that he was wrong.

E **[33]** We are entirely satisfied that the conviction of the appellant is safe. In the result the appeal is dismissed. The conviction and sentence imposed on the appellant are affirmed.

Appeal dismissed.

F Reported by M Sivabarathi

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